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Analogy Interpretation for Renewal Criminal Justice in Indonesia

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Abstract

The order of criminal law in Indonesia until now uses thinking legal-positivism, where the law is considered limited to obeying what is in the text and its meaning which is still formal-textualist. The law must have an element of justice in deciding each case. Thought positivist legal is considered contrary to the social conditions of society. The times have demanded the law to be adaptive, requiring renewal of criminal law and its implementation in the judiciary. The development of an increasingly sophisticated era raises many new problems in society. This study intends to criticize the prohibition of analogies that are considered to be contrary to the principle of legality. Through normative research methods, researchers try to decipher qualitatively by looking at the theoretical basis of the formulation of the problem made regarding the opinions of experts related to the use of legal analogies. Meanwhile, through a descriptive approach, the purpose of this research was to tries to describe the social situation of the people at the time of the prohibition of analogies or the cause of the emergence of the principle of legality with this modern era. The results of this study indicate that a judge is allowed to use analytical interpretation in deciding new cases.

INTRODUCTION

Not many countries have adopted the use of legal analogies in deciding cases, including in Indonesia itself. Prohibition of analogy in Indonesia is the application of the principle of concordation which by the Netherlands at that time was also not permitted to apply the analogy of the law, this is stated in Article 1 paragraph (1) of the Indonesian Criminal Code (KUHP) (Endrawati, 2018). The analogy of law is considered to be contrary to the principle of legality, namely *Nullum delictum nulla poenna sinne praevia lege* means no offense, no criminal if it has not been regulated in the Act. Simply put, an act cannot be convicted if it has not been regulated in law.

The application of the analogy is still a debate between legal experts. Legal experts such as Pompe, said that the principle of legality was created in the 18th century aimed at preventing government abuse (Batarbutar, 2012). However, over the age difference should not cause problems for the fear or abuse of the nobility. Indonesia itself is a democratic country, so that all policies that are considered detrimental to the people can easily mobilize the people to voice their aspirations; especially holding a demonstration.

The law must be adaptive following the modernity of the times. Even though a law is not revised every year, because revising a law is not easy. So there is a possibility that these laws are irrelevant, for example, in an age of technology that has led to a new criminal act that has not been regulated in legislation. This is of course the judge who must think seriously to be able to make decisions that have legal certainty, are fair and in accordance with the actions that have been carried out.

Technological developments in each era can no longer be avoided. The human brain is more perfect with various creations that may be according to the ancestors it is a dream or even unthinkable of their number. Industry 4.0 has mastered in several areas, so even in Indonesia has begun to be studied by some people. The impact of technology is certainly positive and negative. The positive impact can be seen easily by everyone accessing the internet to find out something. The negative impact, besides making it easy can also be a disruption that haunts every human being. Taken as an example is the case of online lending that gives a very large relationship to the debtor, even though the loan company is not clear the name of the company and has not been guaranteed by the Financial Services Authority or *Otoritas Jasa Keuangan* (OJK). In this case the law seems to have to act quickly so that not many victims will end up losing all assets to pay huge bank interest. This is called the law must be adaptive.

The Criminal Law Code or *Kitab Undang-undang Hukum Pidana* (KUHP) which has been used for decades, which is a legacy from the Netherlands for the implementation of the principle of concordation can be practically outdated. In terms of grammar it was already seen that it is not in accordance with the current grammar. Legal-positivism thinking appears in this matter, namely the judge is only a reader of the Act and lacks in terms of legal interpretation.

Based on the use of analogies in criminal law that still raises the pros and cons, including violating or contradicting the principle of legality, the purpose of this research was to tries to formulate the question, namely, whether with the development of this modern era, the use of analogy interpretation is still feared in criminal law. In addition, in Act Number 48 of 2009 concerning The Judicial Power instructs the judge to be obliged to settle a case even though the case has not been clearly regulated in the legislation. Is this still considered that the analogy is contrary to the principle of legality. While the fear of the principle of legality itself, moving on

the history of the application of the principle of legality. Contribution of this research will give a restorative justice in criminal law through using an analogical interpretation.

METHOD

This research is a normative study, where the research approach uses two odels, the first is a qualitative approach by looking at the theoretical basis of the formulation of the problem made regarding the opinions of experts related to the use of legal analogies. Secondly, a descriptive approach which describes the social conditions of the people in the era of the prohibition of analogies or causes of the emergence of the principle of legality with this modern era.

RESULTS AND DISCUSSION

Analogy and Principles of Legality

Analogy, or in Islamic law, is called *qiyas,* which is a method of interpreting new laws where the action being dealt with does not yet exist in legislation. Analogy is closely related to the principle of legality, this is because the analogy is considered inversely proportional to the purpose or purpose of the principle of legality itself.

The background of the principle of legality itself comes from von Feuerbach (1755-1833), a Bachelor of Criminal Law in Germany who put forward "*Nullum dellictum nulla poenna sinne praevia lege*". Starting from the ancient Rowani law, the principle of legality is not known, but there is a word that almost leads to the purpose of the principle of legality in France, namely *criminal extra ordinary crime* which is interpreted as a crime that has not been regulated in the law (Prahassacitta, 2016). Then this *extra ordinary crime* was accepted by the kings of France, so that at that time many abuses in the law made by the kings, this period was named after theera *Ancien Regime*. From this it began to be formulated that an act that was considered to violate the rules must be written first in the *wet* or the law (Moeljanto, 2000). This is so that people know about what they should not do, and this is the beginning of the principle of legality. Furthermore, this principle is also used by the Netherlands which is finally written in *Wetboek v Strafrecht* (WvS), due to the enactment of the principle of conditioning.

Applicability of the principle of legality in Indonesia is based on Article 1 (1) of the Law of Penal (Penal Code), reads:

"An*act can not be convicted, except by the power of the statutory provisions of criminal who has been*there." (KUHAP Kitab Undang-Undang Acara Hukum Pidana)

In the case of this means the analogy cannot be used because it is considered contrary to the principle.

Universally, the principle of legality has three characteristics, including:

a. No criminal without prior statutory regulations,
b. Prohibition of legal analogy, and
c. The prohibition applies retroactively to a law, known as the retroactive principle (Gunarto, 2012).

In addition to the Criminal Code (KUHP), there is also a Draft Criminal Code (RKUHP) written clearly about the prohibition on using the analogy contained in Article 1 paragraph (2) (Yasin, 2016), which reads:

"*In determining the existence of a crime is forbidden to use analogy*. "

This prohibition is also explained in the draft explanation that what is meant is the prohibition of analogy (*qiyas*) on acts not yet regulated in the Act.

As a draft which means a renewal in a legal systematics the use of this analogy should not be clearly stated in the Draft Book of the Criminal Law (RKUHP). Although it is widely understood that the principle of legality is indeed needed so that there is no arbitrariness by the oligarchs of the country's authorities in determining a crime. However, the actual birth of the principle of legality aims to protect the interests of individuals which includes the goal of criminal law according to the classical school. The principle of legality is more on protecting the public from crime (Yasanegara, 2016). so that it can be handled by authorized institutions. It is in protecting the community from crime which is the main point in making rules. It must be admitted that crime can take many forms, especially with the development of increasingly sophisticated and modern times. So we understand that crimes can only be committed and not specifically regulated in a law. For this reason, it is necessary to equate a crime with existing legislation.

The use of analogies in criminal law is still being debated, such as van Bemmelen, van Hattum, Moeljanto, and Jan Remmelink who explicitly reject the use of analogies in criminal law. According to Pompe, he agreed on the use of the analogy of interpretation in criminal law. Because the history of Article 1 paragraph (1) of the Criminal Code essentially states that the conviction of a case is left in full to the judge, then there is no prohibition on analogy (Nugroho, 2018). A judge is given freedom in deciding a criminal case including the use of interpretive analogies in it. Analogy is used to interpret criminal rules that have died or even have no meaning at all. This is based on, so that rules can come alive in the community. Back to the rules must adjust the times, if the times are more modern but legislation or jurisprudence cannot follow. An analogy interpretation is needed to create a more lively law in society.

Law which in Dutch means *recht*, comes from the word *rechtum* which means leader. Because of this, as a leader, the law must be wise. In Latin, law means *ius* which comes from the word *iustitia*. *Iustitia* means fair, because of this also the law

must be fair. The law was created not only as a regulator to be orderly, but also contributed to creating justice in society. The law must also be alive for the community, so that the regulated community does not look like a puppet that is subject to the mastermind without being able to do little. The law must be harmonious and balanced in the community, always following developments in society. The law must not apply retroactively, therefore the judge needs to interpret a case that exists today with an article that is appropriate and fair.

Analogy is needed to find substantial justice in society, because not all legal events are regulated in writing. Therefore an analogy in the sense of this qiyas is really needed and used by the judge in deciding a case, if the judge cannot find a law by analogy. Then the judge is still given the opportunity to use other methods such as interpretation. The validity of the analogy will also require the recruitment of judges who are truly competent in deciding a case by analogy, because the role of judges here is crucial in creating justice in society.

Analogy of Interpretation of Law By Criminal

Judgement Legal interpretation or interpretation of the law is motivated by Hans Gadamer in his book Truth and Method which briefly illustrates, that interpretation develops under the influence of legal science inspiration. As explained in the Codification of Justinian or Corpus Iuris Iustiniani in the VI century. XII century in Italy arises the need for a method that makes juridical texts that apply from an earlier historical method through interpretation can be applied in different societies. Then the interpretation is expanded. The starting point of legal interpretation is human life and its cultural products including juridical texts (Prakoso, 2016).

Interpretation of the law in deciding cases in justice becomes an important part in realizing justice, because the position of judges in deciding cases will be insured both in the world and accounted to God. Judges have a great responsibility in determining justice and ensuring the fulfillment of human rights. Judges' decisions have a practical effect on life, aiming to be the correct application and not the arbitrator's application to the law. Therefore, the application must be based on a correct interpretation (Hamidi, 2011).

Interpretation of the law is closely related to the judge, because it becomes the realm of the judge in interpreting a verse in the article to later make a case decision that is being handled. Problems in interpretation are inseparable from the law itself, because a legal formulation was made or formulated in his day, against the background of the social atmosphere according to his time (Savitri, 2007). Comparison of interpretations of the law that occurred in the nineteenth century was even more legalistic-positivistic, a judge is only intended to be the conveyor of the purpose of the Act, as well as drawing a line at two points. The law is so rigid,

because it forces the public to submit and obey. While the real reality in society is sometimes not in accordance with the regulations that govern it. Interpretation of the law is intended to seek the will of lawmakers.

There are many interpretations of law that can be done to find out the purpose of a regulation, including: authentic, systematic, historical, grammatical, teleological, analogical, extensive, andinterpretation *a contrario*.

a. Authentic Interpretation
   According to Kansil, authentic interpretation is a definite interpretation of the meaning of the words as provided by the legislators.
b. Systematic or Logical
   Interpretation Interpretation of legislation by linking legal regulations or other laws with the whole legal system.
c. Historical
   Interpretation Interpreting the law by looking at the history of the law made.
d. Grammatical
   Interpretation Interpretations made by judges grammatically, if there is a formulation of a law that is unclear or unclear.
e. Teleological Interpretation of
   Sudikno Mertokusumo stated that the judge interpreted the law in accordance with the purpose of the formation of the law (Syaputra, 2017).
f. Analogic Interpretation Analogic
   interpretation or analogy, is an interpretation to look for the similarity of the contents of the legislation with legal actions (Purwaka, 2011) or in Islamic law called *qiyas*.
g. Extensive
   Interpretation Interpretation by expanding the meaning of words in rules (Syaputra, 2017).
h. Interpretation of *a Contrario*
   Interpretation of the law carried out in opposite to be able to know the applicable law (Purwaka, 2011).

In Indonesia, not all interpretations are used by criminal justice judges when deciding a case, such as the prohibition of the analogy of the law which is considered contrary to the principle of legality in Article 1 Paragraph 1 of the Criminal Code (KUHP).

It is different from the interpretation of civil cases, because judges are free to interpret the law than judges who handle criminal cases. Even in civil law there are analogies and interpretations of legal refinement (*rechtsverfijning*) and interpretation *a contario* (Reza, 2011). For this reason, the criminal justice process needs to be renewed

by allowing a judge to apply or provide an analogy interpretation to find a law in deciding a case.

Achmad Ali stressed the existence of the judge's obligation to decide on a case that was filed with him and stated that the main task of the judge was to hear, examine and decide on a case with unclear or non-existent legal reasons. Anthon Freddy also believes that judges basically play a central role in the communication process in court by interpreting (Savitri, 2007). This means that judges must always fill in the blanks of decisions that might occur cases outside of the legislation. It is also regulated in Law Number 48 Year 2009 Judicial Power in Article 10 paragraph (1), which reads "The *court is prohibited from refusing to examine, try, and decide upon a case filed under the pretext that the law is non-existent or unclear, but obligatory examine and try him*" (Undang-Undang Republik Indonesia Nomor 48 Tahun 2009).

Judging from the Article, judges should be allowed to fill the legal vacuum by taking action on every case submitted to him even though it has not been clearly regulated in the Law. Judges must be active and released using legal interpretation in accordance with their beliefs related to the problem at hand. With this, it is certainly necessary to use analogy reasoning to deduce the similarity of data or facts (Lailiyah, 2014) with what is stated in the Law.

The use of analogy interpretation by the judge is intended to provide interpretation of a legal rule by giving an equation to the words contained in the regulation in accordance with its legal principles, so that an act that does not enter into it can be assembled in accordance with the regulation (Imran, 2017). It also intends to create justice in determining sanctions, because justice is what the community needs in a legal system in Indonesia. Judges are not only given discretion in deciding a case by analogy. It is also emphasized that a judge must be a person who is truly wise, and understands the concept rather than *welvaartstaat* as a whole; where the law must contribute to creating justice and prosperity.

The law exists in the midst of the true community to provide security and comfort to the community in carrying out daily activities (Ilya, 2012). In this case, the main purpose of the establishment of a regulation is to protect every individual or group in the house or in the community and state, so that they always feel safe and calm because their individual rights or personal rights are not disturbed by others. You can imagine if there is no criminal law, it is possible that everyone is free to do anything that harms one or more people. For this reason, the criminal law must be able to be adjusted in the order of the community occupied. This means that the law must be able to regulate according to the needs of the community in an area. Not only that, the law seems to have to be able to adjust the development of society all

the time, even though life here is increasingly developing, the law must also be adaptive.

The law should follow the construction of community development, not the other way around the people who must follow the law. If the people uphold the law, whatever the people think and feel will be ignored by the law (Rahardjo, 2006). As time goes by, many crimes will occur and these crimes have not been clearly regulated in legislation. So, the analogy is also needed by the judge to provide flexibility to the judge in giving a decision. Likewise Pompe thought that supports the use of analogies in criminal law on the grounds: analogy is permitted when social change occurs and the process of criminalization has been carried out so narrowly (Tongat, 2016). Simply put, according to Pompe, there are limitations to the analogy only related that the act has not been regulated in the legislation, so the judge is allowed to use the interpretation of the analogy. So the use of this analogy, there are limits only on new actions that have not been clearly regulated in the legislation. Justice in law is very much needed, bearing in mind that the original purpose of criminal law is to create a sense of security in the community. Of course in this case the public surrenders to the judiciary in the hope of deciding cases as fairly as possible.

Besides Pompe, there are also other legal experts who also allow the use of analogies, namely BVA Röling who compares analogies with teleological interpretations, and argues in my opinion, teleological interpretation cannot be ruled out from analogy. According to Röling, an example of using an analogy is the decision of the Dutch Supreme Court to decide that electricity is a thing. The boundary difference between analogy and teleology here is not very clear, so the two are almost similar (Hardinanto, 2016). The important point than this is the permissibility of using analogy, for Röling the interpretation of the analogy is the same as the teleological interpretation. Where explains that all events lead to a specific purpose. That is, a judge who uses an analogy interpretation is actually heading towards a specific goal, namely to find and equate a legal act hidden in the legislation for the creation of a just and appropriate decision in accordance with what has been done by the perpetrators.

According to JE Jonkers, the use of analogies actually does not violate the provisions of Article 1 paragraph (1) of the Criminal Code which discusses the principle of legality (Hardinanto, 2016). This opinion is the same as expressed by Röling. Looking at the side of the social history of the people about the validity of the principle of legality then it is clearly different. Now people can think more critically to create justice in law enforcement. Concerns about the abuse of law enforcement can be dismissed, because there is not just one judicial route. Besides that, it is also known that trias politica's thinking which divides power according to

its domain has been applied. This is different from the history of France where the concept of government at that time was in the form of a kingdom, so that the authorities could arbitrarily claim that the act was criminal and should be punished. Also considering that Indonesia is a state of law listed in the 1945 Constitution of the Republic of Indonesia. By giving freedom to the people to voice their aspirations, namely in the form of a democratic government system. Then the people can easily sue for abuse. Therefore there is no need for concern regarding the use of analogies to interpret an article used in the criminal justice process.

There is also Scholten who argues for his approval related to the use of analogies by judges in criminal law, according to him there is no difference regarding the analogy with extensive interpretation (Tongat, 2016). Analogy is actually also one of the interpretations in finding a law that is stored in legislation so, the use of analogies by judges cannot be prohibited. Once again this research confirms that the use of analogy by judges is aimed at new cases which are not yet listed in the legislation. For the reasons listed, other interpretations can be used to find the purpose of the article relating to the case handled by a Criminal Justice judge.

CONCLUSION

Prohibition of interpreting analogies in criminal cases is no longer relevant today. The first thing is, thought has been set up regarding the political triad and Indonesia itself is a democratic country. Democracy frees its people to voice what they want and don't want. Departing from Pompe's thinking, the analogy of the law seems to need to be used in criminal justice. Therefore, the development of the age and technology to encourage law must always be able to fill the emptiness in the community. The law must adaptive and adjust to the conditions of the times. Modernity has an impact on the emergence of new crimes that have not yet been regulated in legislation or jurisprudence. Therefore, the interpretation of this analogy seems not only to be used in civil justice but must also be used in criminal justice.

REFERENCES

Batarbutar, E. N. (2012). Anatomi Dalam Penerapan Asas Legalitas Dalam Proses Penemuan Hukum. *Yustisia Jurnal Hukum*, *1*(1), 152.

Endrawati, L. (2018). Rekonstruksi Analogi Dalam Hukum Pidana Sebagai Metode Penafsiran Hukum Untuk Pembaharuan Hukum Pidana Dengan Pendekatan Aliran Progresif. *Hermeneutika: Jurnal Hukum*, *2*(1), 83.

Gunarto, M. (2012). Asas Keseimbangan Dalam Konsep Rancangan Undang-Undang Hukum Pidana. *Mimbar Hukum*, *24*(1), 89.

Hamidi, J. (2011). *Hermeneutika Hukum*. Malang: Universitas Brawijaya Press.

Hardinanto, A. (2016). Manfaat Analogi Dalam Hukum Pidana Untuk Mengatasi Kejahatan yang Mengalami Modernisasi. *Yuridika*, *31*(2), 229.

Ilya, A. (2012). Asas-Asas Hukum Pidana, Memahami Tindak Pidana dan Pertanggungjawaban Pidana Sebagai Syarat Pemidanaan. *Rangkang Education*, *1*(1), 1.

Imran, M. (2017). Qiyas dan Analogi Hukum (Suatu telaah dan perbandingan dalam penemuan hukum). *Al-Hurriyah: Jurnal Hukum Islam*, *2*(1), 104.

KUHAP Kitab Undang-Undang Acara Hukum Pidana.

Lailiyah, S. (2014). Penalaran Analogi: Tinjauan Tipe dan Komponennya. *Seminar Nasional TEQIP EXCHANGE OF EXPERIENCES 2014*. Semarang.

Moeljanto. (2000). *Asas-Asas Hukum Pidana*. Jakarta: PT Rineka Cipta.

Nugroho, T. (2018). Pemikiran Pompe Mengenai Analogi dalam Hukum Pidana. Retrieved November 21, 2019, from http://vivajusticia.law.ugm.ac.id/2018/11/29/pemikiran-pompe-mengenai-analogi-dalam-hukum-pidana/

Prahassacitta, V. (2016). The Concept of Extraordinary Crime in Indonesia Legal System: is The Concept An Effective Criminal Policy? *Jurnal Humniora*, *7*(4), 513–521.

Prakoso, A. (2016). *Penemuan Hukum: Sitem, Metode, Aliran dan Prosedur Dalam Menemukan Hukum*. Jember.

Purwaka, T. H. (2011). Penafsiran, Penalaran, dan Argumentasi Hukum yang Rasional. *Masalah-Masalah Hukum*, *40*(2), 118.

Rahardjo, S. (2006). *Membedah Hukum Progresif*. Jakarta: PT Kompas Media Nusantara.

Reza, M. (2011). Kerjasama KPPU Dengan Penyidik Dalam Penanganan Tindak Pidana Hukum Persaingan Usaha, (KPPU in Corporation with Natonal Police in Hadling Criminal Case of Competition Law). *KPPU Competition Law Jurnal*, 104.

Savitri, N. (2007). Tugas Hakim dan Penafsiran. *Jurnal Hukum Pro Justicia*, *25*(4), 340.

Syaputra, M. Y. A. (2017). Penafsiran Hukum oleh Hakim Mahkamah Konstitusi. *Jurnal Mercatorio*, *1*(2), 120.

Tongat, T. (2016). Rekonstruksi Politik Hukum Pidana Naional: Telaah Kritis Larangan Analogi dalam Hukum Pidana. *Jurnal Konstitusi*, *12*(3), 229.

Undang-Undang Republik Indonesia Nomor 48 Tahun 2009. *Kekuasaan Kehakiman*.

Yasanegara, I. (2016). Urgensi Asas Legalitas Dalam Pembaharuan Hukum Pidana Nasional di Indonesia. *Krettha Dyatmka*, *13*(1), 6.

Yasin, I. F. (2016). Analisis Terhadap Larangan Analogi Dalam Rancangan Undang-Undang Hukum Pidana. *Al-Jinayah: Jurnal Hukum Islam*, *2*(2), 410.